

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: October 11, 2001

TO : Ralph R. Tremain, Regional Director
Leo D. Dollard, Regional Attorney
Karen L. Rengstorf, Assistant to Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Industrial Soap Company
Case 14-CA-26554

540-4825-6700

This Section 8(a)(5) case was submitted for advice on whether the Employer, who failed to continue making certain contractual fringe benefits contributions, unlawfully set its own initial terms of employment because it was a "perfectly clear" Burns successor.¹

The Union and the predecessor were parties to a bargaining agreement covering six employees at the predecessor's warehouse. On June 11, 2001, during the term of this agreement, the Employer purchased the warehouse and assets of the predecessor. The Employer thereafter retained all employees continuing operations without hiatus. Around the time of the assets purchase, the predecessor's supervisor, who also was retained by the Employer, distributed discharge notices to employees together with employment applications for the Employer. Although the Employer eventually required employees to submit new tax forms, the Employer never told the employees that they would not be retained.² The Employer itself never told employees that their terms and conditions of employment would change.³

Around one week after it began operations, the Employer told the Union that the Employer would not honor the predecessor's bargaining agreement but would maintain

¹ NLRB v. Burns Int'l Security Services, 406 U.S. 272, 294-95 (1972).

² Around the time of the assets purchase, the predecessor's supervisor told employees that the Employer would hire everyone, which it did, and also that nothing would change.

³ To the contrary, on August 31 long after it had begun operations, the Employer told the unit employees that they "absolutely will not lose any benefits."

prior wages, benefits and vacations. Despite this statement, the Employer did not continue making the contractual pension and Medicare contributions previously made by its predecessor.

The Employer also operated another warehouse where around seven employees were represented by a different union. Around mid August, the Employer announced that the other union now represented all of the Employer's employees. The Union filed Section 8(a)(2) and (5) charges attacking the Employer's recognition of the second union and also its failure to recognize the incumbent Union at the purchased facility. The Region has already decided to issue complaint on these allegations.

We conclude, in agreement with the Region, that the Employer unlawfully discontinued making the pension and Medicare contributions because it was a "perfectly clear" successor obligated to maintain employment terms pending bargaining with the Union.

Although a successor normally has the freedom to set initial terms and conditions of employment for its newly-hired work force, in Burns⁴ the Supreme Court enunciated an exception to this rule where it is "perfectly clear that the new employer plans to retain all of the employees in the unit ... it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." In Canteen Co.,⁵ the Board applied this "perfectly clear" exception to hold that:

when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. [Footnote omitted.] Therefore, as it was "perfectly clear" on [that date] that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.

The Board relied on the fact that at the time the employer contacted the union to say that it wanted employees to serve a probationary period, and the employees to say that it wanted them to apply for employment, it "did not mention in these discussions the possibility of any

⁴ 406 U.S. at 294-95.

⁵ 317 NLRB 1052, 1053 (1995), *enfd.* 103 F.3d 1355 (7th Cir. 1997).

other changes in its initial terms and conditions of employment."⁶ In applying the "perfectly clear" exception, the Board therefore examines not only the successor's plans regarding the hiring of predecessor's employees, but also the clarity of its intentions concerning existing terms and conditions of employment. In Canteen and other cases, the Board has imposed a bargaining obligation over initial terms and conditions under the "perfectly clear" exception based upon the successor's silence as to changing or continuing the existing working conditions at the time it indicated it would be hiring the predecessor's employees.⁷

In our case, the Employer retained all employees without announcing any new terms of employment, either prior to or simultaneous with their beginning employment. This Employer silence at the time it was retaining all employees gave rise to the "perfectly clear" exception.⁸ Since the Employer thus could not set its own initial terms and conditions, its unilateral discontinuance of contributions to the pension and Medicare funds violated Section 8(a)(5).

B.J.K.

⁶ Id. at 1052.

⁷ See, e.g., Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976), enfd. denied in relevant part sub nom. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) (Board imposed initial terms bargaining obligation where employer made unequivocal statement to the union of an intent to hire all of the predecessor's lay teachers without mentioning any changes in terms and conditions of employment); Fremont Ford, 289 NLRB 1290, 1296-1297 (1988) (Board imposed initial terms bargaining obligation where employer manifested intent to retain the predecessor's employees prior to the beginning of the hiring process by informing union it would retain a majority of the predecessor's employees, and did not announce significant changes in initial terms of employment until it began conducting hiring interviews).

⁸ Roman Catholic Diocese, *supra*; Fremont Ford, *supra*. In arguing the "perfectly clear" exception here, the Region should rely upon only the Employer's silence concerning terms and conditions of employment, and should not rely upon the predecessor supervisor's statement to employees that nothing would change.